Vijayalakshmi Devi a/p Nadchatiram v Danapakia Devi a/p Nadchatiram & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–02–483 OF 1995

SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA

31 JANUARY 1997

Land Law *— Restraints on dealings — Caveats — Whether caveat should be allowed to remain — Allegation of breach of trust in dealing with and disposal of company's assets — Whether there is a serious issue to be tried — Whether court should go further and with finality decide the issues in the civil suit which are pending trial — Whether trial judge had misdirected himself by holding that the caveator had failed to prove her case*

The second respondent ('Jega') was a director and the first respondent ('Dana') was the secretary of Nadchatiram Realities (1960) Sdn Bhd (in liquidation) ('the company'). On 18 March 1975, Jega and another director executed a memorandum of charge in favour of Central Malaysian Finance Bhd ('CMF') as security for obtaining a loan for the sum of RM350,000 in respect of a piece of land belonging to the company. It was alleged that the loan of RM350,000 was obtained solely for the benefit of Jega and was converted for the personal use of Jega to purchase in his name and his nominee a piece of land, Lot No 2901, in the town of Seremban which is now subdivided into four separate lots. The appellant lodged a caveat against the four titles. The ground stated was that the registered owner of the land was a constructive trustee of the lands for the company of which the appellant was a contributory and further that the appellant had been given leave of the court to commence an action against the registered owners for a transfer of the land by the registered owners to the company.

In 1992, the appellant commenced misfeasance proceedings against Jega ('the misfeasance proceedings') pursuant to s 305 of the Companies Act 1965. The appellant accused Jega of fraudulent conduct by way of breach of trust in the manner he dealt with and disposed of much of the company's assets. The appellant's contention was that the RM350,000 obtained by Jega from CMF was used to buy Lot 2901. The appellant had also made a general allegation that Jega and Dana had treated the company's funds as their own. The trial judge ordered the removal of the caveat filed by the appellant. The appellant appealed.

Held, allowing the appeal and ordering that the caveat be restored:

Jega as a director, and Dana as secretary of the company and trustees of its assets, had a very heavy onus upon them to show what was done with the company's money. In the absence of conclusive proof from Jega and Dana, they had not given a proper account on how they got the money to pay for the first two instalments for Lot 2901

and what they did with the CMF monies. The appellant's affidavit had a very wide allegation which was not confined to the CMF monies and therefore, caught the first two instalments as well. Any secret advantage made by trustees out of the use of trust funds must accrue to the beneficiary, ie the company.

The only issue with which a court is concerned in deciding whether a caveat should remain is whether there is a serious issue to be tried. It should not go further and with finality decide the issues in the civil suit which are pending trial. On the kind of material before him, it was not really open to the judge to come to findings of fact. He misdirected himself by holding on no evidence at all that the appellant had failed to prove her case when all that was required was to show that there was a serious question to be tried (see pp 596D–E and 598A–B, E–H).

[Bahasa Malaysia summary

Penentang kedua ('Jega') adalah seorang pengarah dan penentang pertama ('Dana') merupakan setiausaha Nadchatiram Realities (1960) Sdn Bhd (dalam penyelesaian) ('syarikat tersebut'). Pada 18 Mac 1975, Jega dan seorang lagi pengarah melaksanakan suatu memorandum cagaran memihak kepada Central Malaysian Finance Bhd ('CMF') sebagai cagaran untuk mendapatkan pinjaman untuk jumlah RM350,000 berhubung dengan sebidang tanah kepunyaan syarikat tersebut. Ia dikatakan bahawa pinjaman sebanyak RM350,000 diperolehi semata-matanya untuk faedah Jega dan ditukar untuk kegunaan persendirian Jega untuk membeli atas namanya dan penerima namaannya sebidang tanah, Lot No 2901, di bandar Seremban yang kini telah dipecah bahagi kepada empat lot berasingan. Perayu mengemukakan kaveat terhadap empat hakmilik itu. Alasan yang diberikan adalah bahawa pemilik berdaftar tanah tersebut adalah pemegang amanah konstruktif untuk syarikat yang mana perayu adalah pencarum dan selanjutnya bahawa perayu telah diberikan kebenaran mahkamah untuk memulakan tindakan terhadap pemilik berdaftar untuk pemindahan tanah tersebut oleh pemilik berdaftar kepada syarikat tersebut.

Pada tahun 1992, perayu telah memulakan prosiding misfeasans terhadap Jega ('prosiding misfeasans') menurut s 305 Akta Syarikat 1965. Perayu menuduh Jega atas penipuan melalui pecah amanah dalam cara dia mengurus dan melupuskan sebahagian besar aset syarikat tersebut. Hujah perayu adalah bahawa RM350,000 yang diperolehi oleh Jega daripada CMF digunakan untuk membeli Lot 2901. Perayu juga telah membuat pengataan umum bahawa Jega dan Dana telah menganggap wang syarikat tersebut sebagai wang mereka sendiri. Hakim perbicaraan memerintahkan pembatalan kaveat yang difailkan oleh perayu. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan dan memerintahkan bahawa kaveat dikembalikan:

Jega sebagai pengarah, dan Dana sebagai setiausaha syarikat dan pemegang amanah asetnya, memikul beban yang berat untuk menunjukkan apakah yang dilakukan dengan wang syarikat tersebut. Dalam ketiadaan bukti muktamad daripada Jega dan Dana, mereka telah tidak memberikan keterangan yang betul tentang bagaimana mereka mendapat wang untuk membayar dua bayaran ansuran pertama untuk Lot 2901 dan apakah yang telah dilakukan dengan wang CMF. Afidavit perayu mengandungi pengataan luas yang tidak terhad kepada wang CMF dan maka, meliputi kedua bayaran ansuran pertama. Apa-apa faedah sulit yang dibuat oleh pemegang amanah daripada wang amanah mestilah terakru kepada benefisiari, iaitu syarikat tersebut.

Satu-satunya isu yang diambil berat oleh sesebuah mahkamah dalam memutuskan sama ada sesuatu kaveat harus dikekalkan ialah sama ada terdapat isu yang serius untuk dibicarakan. Ia tidak harus membincangkannya dengan lebih lanjut dan secara muktamad memutuskan isu-isu dalam guaman sivil yang menunggu penyelesaian perbicaraan. Mengenai jenis material di hadapannya, ia tidak benar-benar terbuka kepada hakim untuk mencapai pendapat mahkamah. Beliau telah menyalah arah dirinya dengan memutuskan tanpa apa-apa keterangan bahawa perayu telah gagal membuktikan kesnya walhal apa yang dikehendaki adalah untuk menunjukkan bahawa terdapat suatu persoalan yang serius untuk dibicarakan (lihat ms 596D–E dan 598A–B, E–H).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

Cases referred to

Kho Ah Soon v Duniaga Sdn Bhd [1996] 1 AMR 977 (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)
Ladd v Marshall [1954] 3 All ER 745 (refd)
Lam Soon Cannery Co v Hooper & Co [1965] 2 MLJ 148 (refd)
Peninsular & Oriental Steam Navigation Co v Johnson (1938) 60 CLR 189 (refd)
Permanent Trustee Australia Ltd v Shand (1992) 27 NSWLR 426 (refd)
Shardy v Tkacz [1991] 1 NZLR 310 (refd)

Legislation referred to

Companies Act 1965 s 305

Appeal from: Originating Summons No 24–149 of 1995 (High Court, Seremban)

RR Sethu (*Satharuban Sivasubramaniam* with him) (*Satha & Co*) for the appellant.

Christopher Fernando (*Haresh Mahadevan* with him) (*Aris Rizal Christopher Fernando & Co*) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): Before the appeal proper was heard, respondents' counsel sought to put in new evidence. The application so dismally failed to meet the test in *Ladd v Marshall* [1954] 3 All ER 745 that we dismissed it with costs. (See *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148.) We do not think the factual basis of that application merits any judicial analysis.

The appeal proper is against an order directing the removal of a caveat filed by the appellant. This dispute between the parties is but another chapter in the litigation between members of the Nadchatiram family which has infested our courts.

The caveat was lodged by the appellant on 26 January 1994 against four titles for the land comprised therein in the town of Seremban ('the said titles'). The ground stated was that the registered owner of the said land was a constructive trustee of the said lands for Nadchatiram Realities (1960) Sdn Bhd (in liquidation) of which the appellant is a contributory and further that the appellant had been given leave of the court to commence an action against the registered owners for a transfer of the said land by the registered owners to the company.

In 1992, the appellant had commenced misfeasance proceedings against Jegadevan Nadchatiram ('Jega') under Seremban High Court Originating Summons No 23–246–92 ('the misfeasance proceedings'). These proceedings were commenced under s 305 of the Companies Act 1965. The subject matter of the exercise was the assets of Nadchatiram Realities (1960) Sdn Bhd ('the company'). From the beginning of 1975 till the company was ordered to be wound up on 5 September 1989, Jega was a director of the company. In the statement of claim dated 24 December 1992, the appellant made very serious allegations against Jega. In effect, he was accused of fraudulent conduct by way of breach of trust in the manner he dealt with and disposal of much of the company's assets. We are now here concerned only with the said four titles, and do not propose to talk about the other accusations now. The first respondent Danapakia Devi ('Dana') was at all material times the secretary of the company with a liability for the company's assets which was co-extensive with that of Jega.

In para 7(a) of the statement of claim, the appellant pleaded:

> Whilst the defendant was one of the directors of the said company, the defendant as a director committed by making, authorizing, sanctioning or participating the following acts of misfeasance and/or breach of trust and/or duty in relation to the company:
>
> (a) On 18 March 1975, the defendant and another director executed a memorandum of charge in favour of Central Malaysian Finance Bhd as security for obtaining a loan for the sum of RM350,000 in respect of a piece of land belonging to the said company and held under HS (D) 3933

for Lot No 3682. The said loan of RM350,000 was obtained solely for the benefit of the defendant and the said loan was converted for personal use of the defendant to purchase in his name and his nominee a piece of land held under Grant for Land No 10799 for Lot No 2901 in the town of Seremban which is now subdivided into four (4) separate lots held under title No HS (D) 11566 for Lot No 13497, HS (D) 11567 for Lot No 13498 and HS(D) 11568 for Lot No 13499 all in the town and district of Seremban in which titles to the land are still registered in the name of the defendant and his nominees, Danapakia Devi d/o of Nadchatiram.

On 5 January 1993, Jega filed a statement of defence in which he responded:

7 Save that the defendant was one of the directors of the company, the rest of the allegations contained in para 7 are denied.

(a) As to sub-para (a) of para 7, the defendant will contend that the loan was taken in the name of the defendant by reason of the refusal of the financial institution to lend money to the company. No part of the loan money was used by the defendant for his personal benefit and the entire money was used for the business of the company. The property held under Grant No 10799 was purchased by the defendant partly with his own money and partly financed by the loan granted by the Great Eastern Life Assurance Co Ltd on the security of the property purchased. Save that the facts admitted therein, the rest of the allegations contained in sub-para (a) are denied.

The misfeasance proceedings are yet to be heard. Full discovery has not yet been given by the defendant. As the appeal records show, the appellant's attempts to get the misfeasance proceedings to trial have been resisted by Jega at every turn. Besides, the liquidator's involvement in the company required the appellant to get the liquidator's concurrence to whatever actions she contemplated involving the company. We do not need to get into all this now. Suffice to say that on 24 January 1994, the appellant obtained an order in Companies Winding-up No 42–2–88 that she be permitted to add the name of the company as a co-plaintiff in the misfeasance proceedings and to take such steps as she may be advised for the recovery of the company's properties Jega had improperly dealt with or disposed. The said caveat was only lodged against the said four titles after order was made and in furtherance of it.

Jega and Dana filed a motion (No 24–149–95) on 1 April 1995 requiring the appellant to show cause why the caveat should be removed.

Contentious affidavits were filed. There was no cross-examination. What was in issue was whether Jega and Dana had utilized the funds of the company to acquire Grant 10799 for Lot 2901 which subsequently were sub-divided into the four titles.

Paragraph 7 of the appellant's affidavit, affirmed on 20 April 1995, to show cause why the caveats should remain, reads:

7.1 On 18 March 1975, the plaintiffs as officers of Nadchatiram Realities (1960) Sdn Bhd (in liquidation) executed a memorandum of charge in favour of Central Malaysian Finance Bhd for the loan of RM350,000

on the security of the land of the said company held under HS (D) 3933 in the mukim of Rasah. A copy of the charge executed by the plaintiffs is now produced, annexed hereto and marked as as 'exh V4'.

7.2 By the said charge, the plaintiffs as officers of the company acknowledged receipt of the sum of RM350,000 upon execution of the said charge. In this connection, I crave leave to refer to the charge.

7.3 The said charge was discharged on 25 September 1980, vide discharge of charge presentation No 6959–80. I crave leave to refer to the endorsement on the charge.

7.4 I now produce and annex hereto and marked as exh V5 photostat copies of the certified copies of the audited balance sheet and profit and loss account of Nadchatiram Realities (1960) Sdn Bhd submitted by the plaintiffs for the years 1974, 1975, 1977, 1978 and 1979 to the Registrar of Companies. I am advised by my solicitors and verily believe that the same balance sheets and profit and loss accounts were also submitted to the Inland Revenue Department.

7.5 The plaintiffs did not submit the balance sheet and profit and loss account after 1979.

7.6 From the accounts, the plaintiffs had concealed to the accountant the above-mentioned charge transaction executed by the plaintiffs on 18 March 1975 whereby a loan of RM350,000 was obtained. One of the allegations of fraud in the misfeasance action is that the plaintiffs had committed fraud by deceiving the accountant. I am advised by my solicitors and verily believe that should the loan secured from the said charge was for the use of the company, the aforesaid loan would have been reflected in the accounts of the company.

7.7 Further, the evidence establishing the plaintiffs' misfeasance, breach of trust, unlawful transfer of properties, misappropriation and conversion of monies would be produced by calling the liquidator of Nadchatiram Realities (1960) Sdn Bhd (in liquidation) and other witnesses to testify at the trial of the misfeasance action, vide Seremban High Court Originating Summons No 24–346–92. Upon winding-up of the company, the liquidator would take control of the company and would also take possession and custody of all documents of the company including bank statements and other necessary documents. By the order of the High Court, Seremban dated 24 January 1994 made in the winding-up proceedings, vide Seremban High Court Company (Winding-up) No 28–2–88, the liquidator is to retain and preserve all documents now in the custody of the liquidator pending the final disposal of the misfeasance action and the Seremban High Court Civil Suit No 22–95–93. A copy of the order is now produced, annexed hereto and marked 'V6'.

7.8 Having regard to the fact that the misfeasance action brought by me as a contributory of the company and the documents of the company are not in my custody, I am unable to produce at this stage, copies of the bank statements and other documents as these documents by law are with the liquidator. Having regard to the order of the court dated 24 January 1994 marked as exh V6 above, the only way I could establish the plaintiffs' misfeasance is by calling witnesses to testify and produce documents at the trial of the misfeasance action.

7.9 I am advised by my solicitors and verily believe that having regard to the peculiar nature of the misfeasance claim, vide Seremban High Court Originating Summons No 24–346–92, which misfeasance action is yet to be heard, any issue or part the issue arising thereon should not be heard and decided in this action. If the court was to do so, I would not only be denied a fair trial as at this state I am unable to produce documents other than by calling witnesses but also greatly prejudiced, particularly by the plaintiffs' contention in para 16 of the joint-affidavit of the plaintiffs affirmed on 1 April 1995 that they have not committed misfeasance or fraud as alleged in the misfeasance action, vide Originating Summons No 24–346–92.

7.10 The plaintiffs are constructive trustees as the said lands were purchased out of the loan of RM350,000 granted by the Central Malaysian Finance Bhd upon the security.

7.11 The plaintiffs had also committed other several acts of misfeasance, particulars of which are set out in details in the misfeasance action. The plaintiffs by the said misfeasance action had virtually treated the company as their own and transferred funds from the company to the second plaintiff.

In their reply, affidavit affirmed on 4 May 1995, Jega and Dana stated as follows:

13 Paragraph 7.1 of the defendant's affidavit is admitted. The plaintiffs deny para 7.2 and will contend that the said charge was a third party charge and the loan pursuant to the charge was released to the borrower, namely Haji Mohd Nor bin Haji So'od. A copy of the relevant charge together with the annexure thereto (loan agreement) is produced herein and marked as 'exh DJ5'. This loan was taken for a joint venture project, ie replanting the company's 200 acres of oil palm and to plant cash crops on a profit sharing basis with the company. A copy of the joint venture agreement dated 10 February 1975 between the company and the said Haji Mohd Nor bin Haji So'od is produced herein as exhibit marked 'DJ6'. The document produced herein and marked as 'exh DJ7' contains photocopies of the official receipts issued by the Central Malaysian Finance Bhd to the said Haji Mohd Nor bin Haji So'od acknowledging the receipts of the repayment of the loan.

We agree with the appellant's counsel that these two averments are contradictory. In the defence, Jega was saying he took the money and spent it in the business of the company. In his affidavit, he is saying the money was given to Haji Mohd Nor bin Haji So'od which flatly contradicts the defence. The key issue here is that no documents had been produced by Jega and Dana to show what was done with the RM350,000. Datin Saraswathy Devi was counsel for Jega and Dana. When the trial judge asked her in the court below for proof of payment to Haji Mohd Nor, she admitted there was none.

The relevant portion of the trial court record reads:

Peguam plaintif: The company's property 'Rasah Land' was charged to Central Malaysian Finance on 18 March 1975 for a loan of RM350,000. This is a three party charge in favour Hj Mohd Nor. The RM350,000 was paid to Hj Mohd Nor

pursuant to a joint-venture agreement. See 'DJ6' in encl 9.

Court: Where is the proof of payment of RM350,000 to Hj Mohd Nor?

Answer: No proof of payment but it is presumed that RM350,000 was paid to Hj Mohd Nor because he repaid various sums of money to Central Malaysia Finance.

See exh DH-7 in lampiran 9.

This is a three party charge in favour of Hj Mohd Noor who has to repay the loan @ RM3,791.66 pm.

See annexure to charge of Rasah property, ie 'DJ-5' of lampiran 9.

The RM350,000 from the charge of Rasah land was not used by the plaintiff to buy the F & N property.

This is but a bare assertion. The relevant evidence was peculiarly within the knowledge of Jega and Dana and they could have been a lot more forthcoming.

Jega as a director, and Dana as secretary of the company and trustees of its assets, had a very heavy onus upon them to show what was done with the company's money. In *Peninsular & Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at p 218, Latham CJ said:

> But in the exercise of his powers he is a trustee for the company and is in a fiduciary relation to the company (*Imperial Mercantile Credit Association v Coleman* (1973) LR 6 HL at p 204). If in fact he does have control of property of the company, he is a trustee of that property and must account to the company for it (*Flitcroft's Case* (1882) 21 Ch D 519). When an account is claimed, each case must be considered in relation to all its circumstances: 'it would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts'. (*Blackstone's Commentaries*, Book III, chap 27 p 437). This statement is even more applicable in the 20th century than in the 18th century. Any person who, as agent or manager or director, has in fact the disposition or control of the moneys or other property of another person is a person who may be ordered to bring in an account.

The appellant's contention was that the RM350,000 obtained by Jega from Central Malaysian Finance ('CMF') around or after 21 March 1975 was used to buy Grant 10799 for Lot 2901. In para 7.11, the appellant had also made a general allegation that Jega and Dana had treated the company's funds as their own. Putting aside Jega's failure to show this charge and the loan obtained in the company's audited accounts and the contradiction as to whether he received this money (as stated in his defence) or Haji Mohd Nor got it from CMF on a third party charge, the fact remains that Jega and Dana have produced no concrete evidence whatsoever to show:

(i) who received this money;

(ii) what was done with it; and

(iii) where they got the money to pay for the first two instalments and redeem the charge.

Jega's case is that he bought Lot 2901 with his own money and a loan from Great Eastern Life ('Great Eastern'). His counsel submits that the chronological sequence conclusively proves that the CMF monies could not have been used to buy Lot 201. This evidence is as follows:

6 February 1975	–	Jega and Dana enter into written agreement with Fraser & Neave (M) Sdn Bhd ('F & N') to buy Lot 2901. Purchase price RM345,384 payable RM86,346 on execution and RM86,346 on or before 6 March 1975 with the balance of RM172,692 payable on or before 6 May 1975. (But no direct evidence as to where Jega and Dana got the money to pay the first and second instalments).
6 March 1975	–	First instalment due for RM86,346.
18 March 1975	–	Jega and Dana execute charge for Lot 3682 to CMF for RM350,000.
21 March 1975	–	Charge presented to land office for registration. (No documentation as to when RM350,000 received and to whom paid.)
6 May 1975	–	Final payment of RM172,692 due.
27 May 1975	–	Great Eastern releases RM175,000 to Allen & Gledhill (see letter 9 June 1975).
2 July 1975	–	Jega and Dana execute charge in favour of Great Eastern for Lot 2901 for RM175,000. But the loan agreement annexed to the charge states that the interest of the loan was to commence from 27 May 1975.

The memorials made by the land office on the document of title are shown in second appeal record at p 545. The registration of the transfer of Lot 2901 and the charge by Jega and Dana to Great Eastern Life was purportedly registered on 21 July 1975 but this was cancelled. The transfer and charge was subsequently registered on 3 September 1975. Counsel for the respondents was unable to explain the significance of these entries to us.

Until clarification at the trial in the pending civil suit, the inference is open that the payments due on the sale and purchase agreement for Lot 2901 were not made on the dates stated in the agreement but at other times. Allen & Gledhill were acting for the vendors and for Great Eastern. Jega and Dana entered into negotiations to raise money at or about the same time they charged the company's land to CMF for RM350,000. Whether any part of this money was used to put through the purchase of Lot 2901 in the meantime is an open question. It is to be noted that the sale and purchase agreement with F & N provided for forfeiture and time was of the essence of the contract. But the sale was not concluded on 6 May 1975 but on 3 September 1975. So the dates in the sale and purchase agreement seem to be very flexible. Even the intermediate use of the company's funds to buy time while the charge to grant Great Eastern was being put through would be enough to ground the cause of action.

In the absence of conclusive proof from Jega and Dana on how they got the money to pay for the first two instalments for Lot 2901 and what they did with the CMF monies whilst they were having obvious problems in paying the balance due to F & N, it must be held that Jega and Dana have not given a proper account. Paragraph 7.11 of the appellant's affidavit was a very wide allegation which was not confined to the CMF monies and therefore, caught the first two instalments as well. Any secret advantage made by trustees out of the use of trust funds must accrue to the beneficiary, ie the company. No receipts were produced from Haji Mohd Nor.

In *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426 at p 429, Young J said:

> It is now clear that this means that the court may extend a caveat not only where it sees that the caveator has established a prima facie case that it has an interest in the land, but also where the court considers that the caveator may well show such a case after it has had the opportunity of discovery and inspection and interrogatories, particularly where the caveator's position will be irretrievable after the registration of a competing deal: see *Penny Nominees Pty Ltd v Fountain* (Young J, 2 May 1989, unreported) and *Rutledge v Jaluit Pty Ltd* (Hodgson J, 31 October 1991, unreported).

The only issue with which a court is concerned in deciding whether a caveat should remain is whether there is a serious issue to be tried. It should not go further and with finality decide the issues in the civil suit which are pending trial. (See *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 at pp 267, 270 and 272. See also *Kho Ah Soon v Duniaga Sdn Bhd* [1996] 1 AMR 977 at p 980.)

And again in *Shardy v Tkacz* [1991] 1 NZLR 310 at p 313, Hardie Boys J said:

> The same is true of the circumstances surrounding the signing of the documents and the obvious changes of date. These are all matters appropriate for the substantive hearing and quite unsuitable for resolution at this interlocutory stage. There is plainly sufficient evidentiary material to sustain the order that the caveat not lapse, at least in the face of a mortgage which is no more than a device to test the issue.

On the kind of material before him, it was not really open to the judge to come to findings of fact. He misdirected himself by holding on no evidence at all that the appellant had failed to prove her case when all that was required was to show that there was a serious question to be tried.

We therefore allowed this appeal and ordered that the originating summons filed in the court below be dismissed and the caveat filed be restored. The respondents must pay the appellant her costs here and in the court below. The appellant's deposit shall be refunded to her.

Appeal allowed.

Reported by David Lai